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In The

Supreme Court of the United States

October Term, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD MADIGAN, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Respondents.

and

FRIENDS OF COLUMBIA RIVER GORGE,

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Supreme Court

BRIEF OF AMICI CURIAE WASHINGTON STATE GRANGE AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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17

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE GORGE ACT IS INCONSISTENT WITH THE FEDERAL STRUCTURE OF OUR GOVERNMENT 3

A. THE GORGE ACT IS MANDATORY 3

B. FEDERAL LAW WHICH DIRECTS STATE LAW EXCEEDS CONGRESSIONAL AUTHORITY 5

II. RETENTION OF LOCAL LAND USE PLANNING DOES NOT ADVERSELY AFFECT INTERSTATE COMMERCE 6

III. THE GORGE ACT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE 7

IV. THE GORGE ACT GREATLY DIMINISHES THE REPUBLICAN FORM OF GOVERNMENT IN PARTS OF WASHINGTON AND OREGON 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) 6, 8, 9

Corfield v. Corvell, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230) 9

Gearin v. Marion County, 223 P. 929 (Or. 1924) 5

Hodel v. Indiana, 452 U.S. 314 (1981) 6, 7

Lagrande/Astoria v. Public Employment Relations Board, 576 P.2d 1204 (Or. 1980) 11

Lucas v. South Carolina Coastal Council, No. 91-453, 1992 WL 142517 (U.S. June 29, 1992) 9

Lynch v. Household Finance Corp., 405 U.S. 111 (1942) 2

Mid-County Future Alternatives Committee v. City of Portland, 795 P.2d 541 (Or. 1990) 11

Missouri v. Jenkins, 495 U.S. 33 (1990) 5

New York v. United States, 60 U.S.L.W. 4603, 1992 WL 134695 (U.S. June 19, 1992) 2, 5, 6, 10, 11

Reilley v. Paulus, 607 P.2d 162 (Or. 1980) 11

State ex rel. Public Welfare Commission v. County Court of Malheur County, 203 P.2d 305 (Or. 1949) 12

State ex rel. Taylor v. Superior Court for King County, 98 P.2d 985 (Wash. 1940) 5

State ex rel. Tax Commission v. Redd, 6 P.2d 619 (Wash. 1932) 12

Wickard v. Filburn, 317 U.S. 111 (1942) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

16 U.S.C. §§ 544-544p ..... *passim*

UNITED STATES CONSTITUTION:

Article IV, § 2 8

Article IV, § 4 10

Amendment X 7

OREGON CONSTITUTION:

Article II, § 18 11

Article XI, § 2 11

WASHINGTON CONSTITUTION:

Article I, § 1 12

Article I, § 33 12

Article XI, § 4 12

Article XI, § 5 12

RULE:

Supreme Court Rule 37 1

INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, The Washington State Grange and the Northwest Legal Foundation, submit this amicus curiae brief in support of petitioner's petition for writ of certiorari. The members of the Washington State Grange are individuals. They are mostly farmers and rural townspeople. It is their liberty, and that of their neighbors, that has been greatly reduced by the Columbia Gorge National Scenic Area Act. 16 U.S.C. §§ 544-544p.

The Washington State Grange is particularly concerned with the powers given to an appointed commission which can impose limitations and/or requirements forcing or prohibiting conversion of farm land to more intensive farm uses or to homes, and the lack of opportunity for meaningful input their members will have in such decisions.

The Northwest Legal Foundation (NLF) is a nonprofit foundation, incorporated under the laws of Washington for the purpose of participating in litigation and education that affects the public interest.

The Board of Directors of the NLF, composed of concerned citizens, a majority of whom are attorneys, authorizes participation in a case only when it concludes that the NLF's position has broad public support. The Board of Directors has authorized the NLF's involvement in this case.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW

This case involves whether or not state and county land use plans and ordinances can be dictated

by the federal government. It is our contention that this case falls squarely in the prohibition of federal control of state statutes articulated in *New York v. United States*, 60 U.S.L.W 4603, 1992 WL 134695 (U.S. June 19, 1992).

However, because the Ninth Circuit Court of Appeals validated the Gorge Act prior to the *New York* decision, this law will not only stand, it will also be used as a model for further federal laws on land use, unless overturned by this Court. Congress is unlikely of its own volition, to apply the *New York* holding, dealing with nuclear waste, to the appeals court tested land use law here.

Individual freedom is vitally linked to land use controls and property rights. "A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Yet the Gorge Act places land use controls in the hands of an unelected commission that is not a federal agency, but must follow federal standards. 16 U.S.C. § 544c.

This Court has noted that state sovereignty is assured in the Constitution in order to protect individual liberties. *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695 (U.S. June 19, 1992).

We respectfully submit that state sovereignty and the individual rights of thousands of citizens in the Gorge Area will be seriously abridged and abused unless this Court grants certiorari.

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals erred by ruling that the Columbia River Gorge Act is valid even though it is a federal act requiring state law making.

2. The Court of Appeals erred in holding that the Commerce Clause authorizes the Columbia River Gorge Act, because changing scenery does not adversely affect interstate commerce.

3. Only selected U.S. citizens are required to be subject to land use planning by an unelected commission. The Court of Appeals erred in not ruling that, even if the Gorge Act is authorized by the Commerce Clause, the Act violates the Privileges and Immunities Clause, and is therefore invalid.

4. The Gorge Act sets up a commission which is appointed, not elected. The Court of Appeals erred in not ruling that even if the Gorge Act is authorized by the Commerce Clause, it violates the Republican form of Government guarantee, and is therefore invalid.

ARGUMENT

I

THE GORGE ACT IS INCONSISTENT WITH THE FEDERAL STRUCTURE OF OUR GOVERNMENT

A. THE GORGE ACT IS MANDATORY

The Gorge Act directly, and through requirements imposed on local legislators and an appointed commission, regulates all land use planning and land uses in the Gorge Area. Only this one specific area of the country, the

Columbia River Gorge Area, is so regulated. § 544b (a). Eighty four and one half percent (84.5%) of the 285,000 acres in the Gorge Area is *private* land.

The federal government regulates land use planning by designating specific "urban areas," including Hood River, Oregon, North Bonneville, Washington, and White Salmon, Washington. Then an appointed commission is established, § 544c. The Commission is instructed, step by step, how to adopt management plans for this extensive area of privately owned land, § 544d. It is important to understand the Gorge Commission is *not* an agency of the federal government. § 544c (a)(1)(A).

After adoption of a management plan, the Commission submits it to the Secretary of Agriculture for review. § 544d (f). Even if the commission uses a secretarial override provision, the commission's management plan for private property and businesses must be consistent with the standards and purposes of the Gorge Act. §§ 544d (f)(3)(B). Therefore, there is *no option* on whether or not the commission follows the Act's standards when adopting a management plan.

Local counties are then required to adopt ordinances "consistent with the management plan." § 544e (b)(1). If the counties refuse, the commission shall publish and impose its own ordinance. § 544e (c). Local counties must either legislate an ordinance consistent with federal standards or the federally created commission, which is not an agency of the federal government, shall write local ordinances, controlling land use.

This entire system was set up *prior* to any interstate compact. The federal statute states, "the states of Oregon

and Washington *shall* establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . " § 544c (a)(1)(A) (emphasis added). This does, in fact, destroy the state sovereignty in a fundamental area – the uses of land within its sovereign boundaries.

B. FEDERAL LAW WHICH DIRECTS STATE LAW EXCEEDS CONGRESSIONAL AUTHORITY

"No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695, at *20 (U.S. June 19, 1992). The Gorge Act requires either counties in the Gorge Area, or the Gorge Commission, to enact and enforce ordinances consistent with the federal standards. 16 U.S.C. §§ 544e (b)(1) and (c)(1). It requires the Gorge Commission to enact management plans consistent with federal standards. Failure to do so results in violation of federal law and resulting penalties.

Counties are political subdivisions of their respective states. Local government bodies must derive their power from a sovereign, and that sovereign is the state. *Missouri v. Jenkins*, 495 U.S. 33 (1990). See *Gearin v. Marion County*, 223 P. 929 (Or. 1924) and *State ex rel. Taylor v. Superior Court for King County*, 98 P.2d 985 (Wash. 1940).

Likewise, the Gorge Commission must obtain its authority from a sovereign. As Congress has denied federal authority, the states must be the sovereign. The

Gorge Commission members are appointed by state governors and county officials, so their creation is by the states (at the compulsion of the federal government).

The federal government has required states to regulate here. The Columbia River Gorge Act falls squarely in the *New York* prohibition, and is therefore invalid.

II

RETENTION OF LOCAL LAND USE PLANNING DOES NOT ADVERSELY AFFECT INTERSTATE COMMERCE

The Court of Appeals found constitutional authorization for the Columbia River Gorge Scenic Area Act, 16 U.S.C. §§ 544-544p, in the Commerce Clause. *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992).

While the commerce clause has been interpreted to include authorizing regulation of many things other than actual interstate commerce, it has never been applied to general land use planning. See *Wickard v. Filburn*, 317 U.S. 111 (1942). When a particular land use was regulated by the federal government, and upheld as a commerce power, the regulation was directed at individual citizens, not to governing bodies. *Hodel v. Indiana*, 452 U.S. 314 (1981).

The regulation of land use to "protect" scenery does not even meet the minimal rational basis test of *Hodel v. Indiana*, 452 U.S. 314 (1981). Direct regulation of land use is not authorized by the commerce clause, or any other

clause. Powers not expressly given to the federal government are reserved to the states. U.S. CONST. amend. X.[1]

In *Hodel*, the regulated land use was singular, that of surface mining. Also in *Hodel* the appellees did not claim that surface mining did not create a perceived environmental hazard, such as water pollution, that may have effects on other states. Here, we do claim that there is not an environmental hazard that may have effects on other states from building a house, subdividing land, building a barn, or an office building, or converting from cattle raising to growing wheat. Petition for writ of certiorari p. 14. Land use in general, while it may change scenery, it does not adversely affect interstate commerce. Further, no criteria exist which measure, or can measure, quality of scenery. Permitting this act to stand will leave such decisions in the hands of the unelected.

Even if the Court were to find that construction on private land is affecting interstate commerce, the Gorge Act is fatally flawed for other reasons.

III

THE GORGE ACT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

The issue of unequal treatment of citizens in one geographic area, was before the Court of Appeals in this

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[1] Amendment X: "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people."

case. 960 F.2d 110, 115 (9th Cir. 1992), Petition for Writ of Certiorari, p.9. The Petitioners call this an equal protection challenge, but the same issue can be analyzed under the Privileges and Immunities Clause.[2]

It may not be necessary here to answer the question of whether the Congress can constitutionally regulate land use directly throughout the United States. However, Congress has designated particular towns as "urban areas." 16 U.S.C. § 544b. Establishment of scenic area (e) urban areas. These boundaries may only be changed by the Gorge Commission (an unelected body), and then only if a demonstrable need exists to accommodate long range urban population growth . . . 544b (f). Revision of Urban Area boundaries.

No explanation nor criteria is given as to why these towns are designated urban. Hundreds of other towns across the country near scenically beautiful land, are not so designated. Can it be that farms and houses in the Gorge Area affect interstate commerce, while farms near other state borders or even away from borders do not?

What is the basis for this unequal treatment? The Privileges and Immunities clause should invalidate such unequal treatment of Washington and Oregon citizens compared to citizens of other states.

The Clause has been interpreted by this Court to include privileges and immunities which are fundamental, which "belong, of right, to the citizens of all free

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[2] U.S. CONST. art. IV, § 2. The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens of the several states.

governments . . . *Corfield v. Corvell*, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230). General headings for the fundamental privileges and immunities include "the right to acquire and possess property of every kind." *Corfield*, 6 F. Cas. at 551. This right must include the right to common law uses, if it is to have any meaning. *Lucas v. South Carolina Coastal Council*, 1992 WL 142517 (U.S. June 29, 1992). Background principles of state property law or nuisance must be identified by the government before private land can be converted to public use through regulation. *Lucas v. South Carolina Coastal Council*, 1992 WL 142517 (U.S. June 29, 1992). It is likely that in an effort to "protect scenery", the government would prohibit all economically viable land uses of hundreds, if not thousands of parcels of land. No administrative method of paying compensation to these selected property owners is provided for in the Gorge Act.

Here, the right to possess and use one's property is being denied some United States citizens based on a congressional action. Congress has designated one special area of the country, eighty four and a half percent (84.5%) privately owned, a national scenic area. The federal statute does not compel land use plans and ordinances in all scenic areas, or even all scenic areas near state borders.

While the Court of Appeals noted that the Columbia River Gorge area was one of "critical national significance," 960 F.2d 110, there is no such specific finding by Congress, nor are there any criteria for what makes an area of predominantly privately owned property susceptible to scenic area designation. Such arbitrary action by Congress violates the privileges and immunities of the United States citizens living in the Gorge Area.

IV

THE GORGE ACT GREATLY DIMINISHES THE REPUBLICAN FORM OF GOVERNMENT IN PARTS OF WASHINGTON AND OREGON

The Guarantee Clause of the United States Constitution provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." Article IV, § 4.

The Gorge Commission established in the Gorge Act is an appointed body. For each state, three members are appointed by their county governing body and three members by the state's governor. § 544c (a)(1)(c). There is also one non voting member who is an employee of the Forest Service, appointed by the Secretary of Agriculture. § 544c (a)(1)(C)(i). In 240,000 acres of The Gorge Area, private land use is controlled by an appointed body.

State sovereignty will be protected if this Court finds that general land use regulations do not affect interstate commerce. Even if the commerce clause is found to authorize regulation, however, an incidence of state sovereignty will be protected here only by a limitation on the commerce power.

" . . . where the Federal Government compels states to regulate, the *accountability* of both state and federal officials is diminished. *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695, at *15 (emphasis added). Here the federal government has compelled land use planning and controls. §§ 544-544p. "Accountability is thus diminished when, due to federal coercion, *elected* state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by

federal regulation." *New York v. United States*, 1992 WL 134695, at *15 (emphasis added). Here, the commission that regulates land use, either directly or through veto power over county ordinances, is not even *elected*. General land use planning and ordinances are enacted by an appointed commission.

This flies in the face of both the Washington and Oregon Constitutions, as well as Republican principles.

The Constitutions of both Oregon and Washington reserve all legislative power to their respective legislatures. The Oregon Constitution, Article II, § 18, provides for recall of elected public officials (not possible with the Commission) and prohibits to the legislature the exclusive power of lawmaking,[3] and prohibits limitation of the peoples' referendum powers (not possible with the Act or Compact); Oregon Constitution, Article XI, § 2, requires voter approval before imposition of new local government apparatus (which most decidedly did not occur here).

The Oregon legislature may not impose a new local government apparatus on a select group of people without giving them the chance to approve or veto the proposal. *Lagrande/Astoria v. Public Employment Relations Board*, 576 P.2d 1204, 1215 (Or. 1978); *Reilley v. Paulus*, 607 P.2d 162, 165 (Or. 1980). *But see Mid-County Future Alternatives Committee v. City of Portland*, 795 P.2d 541, 548-49 (Or. 1990) (*Reilley* not followed). A law is local or

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[3] Recall that the Commission can write local land use ordinances. 16 U.S.C. §§ 544d, 544f.

special if it is intended to affect only certain persons or localities. *State ex rel. Public Welfare Commission v. County Court of Malheur County*, 203 P.2d 305, 315 (Or. 1949).

Similarly, Washington Constitution, Article I, § 1, states: "All political power is inherent in the people"; Washington Constitution, Article I, § 33, provides for recall of elected public officers; Washington Constitution, Article XI, § 4, requires uniformity of county governments (not possible when the Commission rules selected counties or portions thereof); and Washington Constitution, Article XI, § 5, requires election of county officers. The legislature cannot take from the people the right of local self-government secured to them by their state constitution. *State ex rel. Tax Commission v. Redd*, 6 P.2d 619, 622 (Wash. 1932).

The Gorge Act infringes the rights of some property owners in Washington and Oregon to vote for persons with the power to affect their property. Because the Act and compact adversely affect the rights of franchise, which are protected by these state constitutions, the compact has violated State Constitutions. The state officials who voted for the compact, as directed by Congress in § 544, lacked the power to convey the voting rights of their citizens.

In addition, Congress has not only failed to protect and guarantee a Republican form of government here, it has actively moved to selectively deny individual citizens the right to vote for the people who make decisions on their land use.

CONCLUSION

The purpose of the Act is defeated by invalidation of the Gorge Commission and the requirements for local ordinances. Therefore, this interrelated scheme of federal dictates over local land use must fail in toto. Unless the Court accepts certiorari, the Act will be considered valid and will not only continue to operate, but likely be used as a pattern for other congressional actions. The potential for abuse is staggering, the consequences devastating to people who have a tradition of government protection of private property for their use. The Gorge Act turns around a 200 year tradition of limited government and replaces it with government greatly limiting citizens. We urge the Court to grant the petition for certiorari.

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Respectfully submitted,

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